MISSOURI SUPREME COURT

JULIA BROOKS,	)	
	)	
Petitioner-Respondent,	)	
	)	
v.	)	**No.: 84748**
	)	
JEFFREY M. BROOKS,	)	
	)	
Respondent-Appellant.	)	

SUBSTITUTE REPLY BRIEF OF RESPONDENT-APPELLANT, JEFFREY M. BROOKS

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JURISDICTIONAL STATEMENT

Petitioner-Respondent, in her Jurisdictional Statement, posits that this Court is without jurisdiction in this case. She relies upon this Court's holding in Kuyper v. Stone County Commission, 838 S.W.2d 436 (banc 1992). Kuyper involved a case which the Court of Appeals, Southern District transferred to this Court as a matter of general interest or importance without issuing an opinion on the merits. On that basis, this Court determined that it did not have jurisdiction. However, this Court remedied that situation by ordering transfer itself. Id. p. 439.

Clearly, this Court has jurisdiction when the Court of Appeals renders an opinion on the merits, even if that opinion directs that the case is dismissed. For example, see L.J.B. v. L.W.B., 908 S.W.2d 349 (Mo. banc 1995), where the Eastern District of the Court of Appeals dismissed on the grounds that the notice of appeal related to a decree that was subsequently vacated by the trial court and replaced by an amended decree. This Court granted transfer and determined that the purported defect with regard to the notice of appeal did not defeat appellate jurisdiction and re-transferred the matter to the Court of Appeals

it would not have had jurisdiction to transfer L.J.B.

II.

THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL BECAUSE IT HAD JURISDICTION TO PROCEED IN THAT THE NUNC PRO TUNC OF NOVEMBER 1, 2001 WAS EFFECTIVE TO INCLUDE "JUDGMENT" IN THE DESIGNATION AND HEADING OF THE QDRO AS SUCH DOCUMENTS ARE SUBSTANTIVELY JUDGMENTS AND THE UNDERLYING DECREE OF DISSOLUTION SERVES AS THE NECESSARY WRITING TO SUPPORT ENTRY OF THE NUNC PRO TUNC.

Funkhouser v. Meadowview Nursing Home, 816 S.W.2d 947 (Mo. App. 1991)

Keck v. Keck, 969 S.W.2d 765 (Mo. App. 1998)

County Asphalt Company v. Demein Construction Company, 14 S.W.2d 680 (Mo. App. 2000)

Pirtle v. Cook, 956 S.W.2d 235 (Mo. banc 1997)

III.

THE TRIAL COURT ERRED IN ENTERING A QUALIFIED DOMESTIC RELATIONS ORDER AND JUDGMENT WHICH AWARDED WIFE SURVIVOR BENEFITS IN EXCESS OF THOSE NECESSARY TO IMPLEMENT THE DIVISION OF PROPERTY SET FORTH IN THE DECREE OF DISSOLUTION BECAUSE SUCH JUDGMENT IS BASED

TRIAL COURT'S JURISDICTION IN THAT FULL SURVIVOR BENEFITS SET UP A POSSIBLE WINDFALL FOR WIFE IN THE EVENT OF HUSBAND'S DEATH AND PREVENT A SUBSEQUENT SPOUSE OF HUSBAND FROM RECEIVING SURVIVOR BENEFITS.

Rowe v. Moss, 656 S.W.2d 318 (Mo. App. 1983)

Wells v. Wells, 998 S.W.2d 165 (Mo. App. 1999)

Walker v. Walker, 954 S.W.2d 425 (Mo. App. 1997)

Metropolitan Life Insurance Company v. Williams, 82 F.Supp. 1346 (M.D. Fla. 1999)

THE TRIAL COURT ERRED IN ENTERING A QUALIFIED DOMESTIC RELATIONS ORDER AND JUDGMENT WHICH AWARDED WIFE SURVIVOR BENEFITS IN EXCESS OF THOSE NECESSARY TO IMPLEMENT THE DIVISION OF PROPERTY SET FORTH IN THE DECREE OF DISSOLUTION BECAUSE SUCH JUDGMENT IS BASED UPON A MISAPPLICATION OF THE LAW AND IS IN EXCESS OF THE TRIAL COURT'S JURISDICTION IN THAT FULL SURVIVOR BENEFITS SET UP A POSSIBLE WINDFALL FOR WIFE IN THE EVENT OF HUSBAND'S DEATH AND PREVENT A SUBSEQUENT SPOUSE OF HUSBAND FROM RECEIVING SURVIVOR BENEFITS.

Wife claims that the trial court did not have jurisdiction to denominate the Qualified Domestic Relations Order as a Qualified Domestic Relations Order and Judgment nunc pro tunc on November 1, 2001. [Supp. L.F. p. 1]. A court's power to issue a nunc pro tunc order correcting its records is a common law power derived from the court's jurisdiction over its records. A court is considered to have continuing jurisdiction over its records, which exists independently from the court's jurisdiction over its cause or its judgment. Power over its records exists so that the court can cause its records to represent accurately what occurred previously. Errors can occur between the judicial act of the court in rendering judgment and the ministerial act of entering it upon the record. The power to issue nunc pro tunc orders constitutes no more than the power to make the record conform to the judgment already rendered; it cannot change the judgment itself. The theory of a judgment nunc pro tunc is that it is entered now for then, and

was actually awarded, and, from some oversight or otherwise, failed to be incorporated in the original entry. County Asphalt Company v. Demien Construction Company, 14 S.W.3d 680, 683 (Mo. App. 2000).

The reliance by the Court of Appeals on Keck v. Keck, 969 S.W.2d 765 (Mo. App. 1998) is misplaced. The gist of Keck was that nunc pro tunc cannot be utilized to **create** a judgment from findings and recommendations made by a Family Court Commissioner. In Keck, no judgment ever existed, as the document, the findings and recommendations, was signed by a Family Court Commissioner. Clearly, the nunc pro tunc power cannot be utilized to construct a judgment where none previously existed.

Subsequently, Keck has been read broadly to seemingly prohibit the utilization of nunc pro tunc while any case is on appeal even when the court is causing its records to represents accurately what occurred previously. Pirtle v. Cook, 956 S.W.2d 235, 240 (Mo. banc 1997). The instant case is not alone. See, e.g. Baker v. Baker (Slip. Op. No. E.D. 81083, October 29, 2002).

Clearly, Wife, having apparently proffered the proposed Qualified Domestic Relations "Order" for entry by the trial court cannot now claim that a nunc pro tunc denomination of that order as a "judgment" is not allowable because of the appeal. Such an action by the trial court was clearly ministerial so as to conform to the requirements of Rule 74.01, a ministerial oversight caused at least in part by Wife as a result of her apparent draftsmanship. She cannot now claim that the trial court did not have jurisdiction to remedy this ministerial error so as to bring its action in line with Rule 74.01.

Wife also presents a challenge to the timeliness of Husband's Notice of Appeal. While the "order" was file-stamped as a result of its filing with the Court June 14, 2001, it was not entered as a judgment until signed by the Court July 9, 2001. See, Stephens v. Brekke, 977 S.W.2d 87, 90 (Mo. App. 1998). The

August 20, 2001, the Monday following Saturday, August 18, 2001. Funkhouser v. Meadowview Nursing Home, 816 S.W.2d 947 (Mo. App. 1991).

In sum, the nunc pro tunc is effective and this Court has jurisdiction to decide this matter on the merits in accordance with Point III hereof.

THE TRIAL COURT ERRED IN ENTERING A QUALIFIED DOMESTIC RELATIONS ORDER AND JUDGMENT WHICH AWARDED WIFE SURVIVOR BENEFITS IN EXCESS OF THOSE NECESSARY TO IMPLEMENT THE DIVISION OF PROPERTY SET FORTH IN THE DECREE OF DISSOLUTION BECAUSE SUCH JUDGMENT IS BASED UPON A MISAPPLICATION OF THE LAW AND IS IN EXCESS OF THE TRIAL COURT'S JURISDICTION IN THAT FULL SURVIVOR BENEFITS SET UP A POSSIBLE WINDFALL FOR WIFE IN THE EVENT OF HUSBAND'S DEATH AND PREVENT A SUBSEQUENT SPOUSE OF HUSBAND FROM RECEIVING SURVIVOR BENEFITS.

Wife's argument that Husband's challenge to the distribution provisions of the Qualified Domestic Relations Order should have been addressed by the trial court must fail. There was no motion presenting this proposed distribution to the trial court or notice provided to Husband of its presentation. Consequently, there was no opportunity to challenge the distribution provision as not being in compliance with the Decree of Dissolution prior to their entry. Moreover, a motion for new trial is not necessary to preserve contentions for review and an appellant may even raise points on appeal not mentioned in a motion if such a motion were filed. Rowe v. Moss, 656 S.W.2d 318, 322 (Mo. App. 1983).

Additionally, the cases upon which Wife relies are inapposite. Wells v. Wells, 998 S.W.2d 165 (Mo. App. 1999) merely directed the trial court to allow a party to proceed on a motion to modify a QDRO. It did not prohibit direct appellate review of the entry of same. Walker v. Walker, 954 S.W.2d

Court considered itself prohibited from addressing an issue in the appeal of one of the motions involving a pre-existing factual issue which had not been included in one of the prior motions. Consequently, Walker is of no assistance to Wife.

Wife claims that Husband lacks standing to appeal as he is not aggrieved. Were Wife's analysis correct, the former husband in Wells v. Wells, 998 S.W.2d 165 (Mo. App. 1999) (relied upon by Husband herein) would have had no standing either. In fact, no party challenging the entry of a Qualified Domestic Relations Order dealing with any benefits to be awarded in the future would have standing under Wife's analysis. The plethora of QDRO-related cases refutes Wife's position.

Finally, Wife mounts an assault on this Court's ability to deal with the issue of the QDRO at all on the basis of ERISA. Wife claims that ERISA preempts all state law so as to prevent entry of any QDRO which purports to fail to allocate the participant's survivor's benefits to his or her spouse. There is more than one problem with this position. First, QDROs are not preempted by ERISA. Boggs v. Boggs, 117 S.Ct. 1754, 1764 (1997). See also, Metropolitan Life Insurance Company v. Williams, 82 F.Supp. 1346, 1351 (M.D. Fla. 1999).

Moreover, from a pure common sense perspective, to prohibit allocation of survivor's benefits between the participant and the participant's ex-spouse, and further to not only allow but encourage a portion of a participant's retirement plan to be allocated to the participant's ex-spouse along with the participant's survivor's benefits, is absurd. Such a preemption by ERISA would invade the domestic relations jurisdiction of the states, a matter traditionally of state prerogative. See, Metropolitan Life Insurance Company v. Wheaton, 42 F.3d 1080, 1082 (7th Cir., 1994).

For all the foregoing reasons, and for those set forth herein and in Respondent-Appellant's Substitute Brief, Respondent-Appellant, JEFFREY M. BROOKS, prays that the Court reverse the Qualified Domestic Relations Order of July 9, 2001 entered to effectuate the division of the pension benefit divided in the Decree of Dissolution and remand this matter to the trial court for correction of the language contained therein with regard to survivor benefits.

Respectfully submitted,

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The undersigned hereby certifies that one (1) copy of the foregoing Substitute Reply Brief of Respondent-Appellant, as specified in Rule 84.06(a) and one (1) copy of the disk as specified in Rule 84.06(a), were mailed U.S. postage prepaid, this ____ day of December, 2002, addressed to: Nathan S. Cohen, Attorney for Petitioner-Respondent, 210 South Bemiston, Clayton, Missouri 63105 and Benicia Baker-Livorsi, Co-Counsel for Petitioner-Respondent, 566 First Capitol Drive, Saint Charles, Missouri 63301.

Lawrence G. Gillespie

STATE OF MISSOURI)
) ss.
COUNTY OF SAINT LOUIS)

Comes Now LAWRENCE G. GILLESPIE, being duly sworn upon his oath, deposes, and states that the facts stated in the foregoing are true and correct to the best of his knowledge, information and belief.

Lawrence G. Gillespie

Subscribed and sworn to before me, a Notary Public, this the _____ day of December, 2002.

Notary Public

My Commission Expires: